MOHAN RAJADURAI

v.

MAJLIS PERUBATAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL KADIR SULAIMAN J
[ORIGINATING MOTION NO: R1-25-114-94]
28 OCTOBER 1997

PROFESSIONS: *Medical practitioners - Professional misconduct - Domestic tribunal - Proceedings stretched over long period of time - Decision-makers made up of different persons each day - Whether there was an error of law*

PROFESSIONS: *Medical practitioners - False medical certificate - "Infamous conduct" - Whether failure to keep medical records amounts to "infamous conduct" - Medical Act 1971, s. 29(2)(b)*

PROFESSIONS: *Medical practitioners - Advertisement - Use of banners - Whether banner was for purpose of promoting professional advantage*

Upon the recommendation of the preliminary investigation committee ('the PIC') appointed by the respondent, pursuant to reg. 26 of the Medical Regulations 1974, the respondent sent a letter dated 3 June 1992 informing the applicant that an inquiry would be held against him on two charges, namely (a) that the applicant had failed to keep proper medical records of consultations for certain patients to whom he had issued medical certificates for sick leave certifying that they were unfit to perform their duties and (b) that the applicant had advertised through a banner announcing the commencement of his clinic.

According to the records of proceedings, the applicant was found guilty on both charges. After mitigation was presented, on the first charge, the applicant was suspended for three months and, on the second charge, he was reprimanded.

The applicant then filed an originating motion for an order that the impugned decision of the respondent made on 27 October 1994 be reviewed and reversed. Among the issues raised were: (a) whether a failure to keep proper medical records constitutes "infamous conduct" under s. 29(2)(b) of the Medical Act 1971; (b) whether the banner was for the purpose of promoting the applicant's own professional advantage; and (c) whether there was an error of law in the decision of the respondent.

Held:

[1] The motion of the applicant was filed well within the one-month time limit given by O. 55 r. 13 of the Rules of the High Court 1980 ('RHC').

[2] It was not for the applicant to negative the allegation made against him. A party who asserts must prove his case, failing which no case can ever be made out against the other party.

[3] There was never any obligation in law or ethics cast upon the applicant to keep any records in respect of his patients to whom medical sick certificates were issued. Furthermore, in the proceedings before the PIC, no evidence was led to show what really was a proper medical record or what constituted such a record – and none of the patients were called to give evidence to substantiate the charge even though those patients were within the power of the complainant to call as witnesses.

[4] Any wrongful certification cannot be regarded as amounting to 'infamous or disgraceful conduct'. This is because 'infamous or disgraceful conduct' should be construed in conjunction with the word "in any professional respect" and to make good such a charge in relation to the keeping of the prescribed records, it is not good enough to show that some mistake has been made through carelessness or inadvertence from two or three cases out of several hundred patients treated. To make such a charge good there must, generally speaking, be some moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent or reckless disregard of the practitioner's duty in relation to records as may be said to amount to dishonesty for the purpose.

[5] In relation to the second charge, the banner was not for the purpose of promoting the applicant's own professional advantage and also not for the purpose of directing attention to the applicant's professional skill, knowledge, services or qualifications, and also not for the purpose of depreciating those of others as contemplated by the Code of Professional Conduct. The banner was put up for the purpose of assisting potential patients to locate the applicant.

[6] The proceedings against the applicant stretched over a period of time and the decision-makers were not made up of the same persons forming the body. It therefore could not be said that the decision made by the respondent was correct in law because notwithstanding that the proceedings were recorded on audio tapes for the benefit of those who were not present during certain days of the proceedings, they would merely be listening to the recorded voices of those who took part throughout but they were

precluded from having the opportunity of seeing for themselves the demeanour of each of the witnesses giving their evidence. There was therefore an error of law on which the decision of the case depended.

[Appeal allowed.]

Cases referred to:
Dudley Ernest Lyncoln Wager Felix v. General Dental Council [1960] AC 704 ***(foll)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Another Appeal [1997] 1 CLJ 665 ***(refd)***
Pearlman v. Keepers & Governors of Harrow School [1979] 1 QB 56 ***(foll)***

Legislation referred to:
Medical Act 1971, ss. 29(2)(b), 30, 31
Medical Regulations 1974, reg. 26
Rules of the High Court 1980, O. 33 r. 2, O. 52 r. 4, O. 55 r. 13(1)

For the applicant - Albert Toong Yu Leong; M/s Albert Toong & Assoc
For the respondent - Stefeny David; M/s Aziz & Mazlan

Reported by Maritte Peters-Goh

JUDGMENT

Abdul Kadir Sulaiman J:

Upon the recommendation of the Preliminary Investigation Committee (hereinafter referred to as 'the PIC'), appointed by the respondent, the Majlis Perubatan Malaysia, pursuant to reg. 26 of the Medical Regulations 1974, the respondent sent a letter dated 3 June 1992 informing the applicant that an inquiry would be held against him on two charges as follows:

(a) That you, Dr. Mohan s/o Rajadurai, between the period of 13th May 1987 to 10th April 1990 at your clinic at No. 6 Jalan Adil, Taman Sri Muda, Shah Alam, failed to keep proper medical records of your consultations for the following patients (22 names in all supplied below the charge) to whom you had issued medical sick certificates certifying that they were unfit to perform their duties.

(b) That you, Dr. Mohan s/o Rajadurai, had on or about the 15th day of April 1990 advertised through a banner announcing the commencement of your clinic at Taman Sri Muda, Shah Alam.

Thereby you are liable to disciplinary jurisdiction under s. 29(2)(b) of the Medical Act 1971 and punishable under s. 30 of the Medical Act 1971.

According to para. 11(xxxiii) of the affidavit of the applicant of 24 October 1994 in support of an Originating Motion filed on the same date, following the aforesaid inquiry, he on 16 August 1994 was found guilty by the respondent on an offence not relating to the first charge. The said affidavit however, did not disclose the date of the decision in relation to the second charge preferred. According to para. 10 of the said affidavit the appellant deposed that on the first charge he was suspended from practice for three months and on the second he was reprimanded.

Being aggrieved by the said decision, the applicant on 24 October 1994, filed an Originating Motion for an order that the impugned decision of the respondent made on 27 September 1994 be reviewed and reversed. According to the headings to the said Originating Motion, this motion was made in the matter of a disciplinary proceedings against the applicant before the respondent, in the matter of the decision of the respondent in MPM Inquiry No. 10/92, in the matter of ss. 29 and 31 of Medical Act 1971, in the matter of O. 52 r. 4, of the Rules of the High Court 1980 (hereinafter referred to as 'the RHC'), and in the matter of O. 55 r. 13 of the RHC. Section 29 of the 1971 Act concerns the disciplinary jurisdiction of the respondent and s. 31 concerns the appeal against the order of the respondent. Section 31 states:

> 31(1) Any person who is aggrieved by any order made in respect of him by the council in the exercise of its disciplinary jurisdiction may appeal to the High Court, and the High Court may thereupon affirm, reverse or vary the order appealed against or may give such direction in the matter as it thinks proper; the cost of the appeal shall be in the discretion of the High Court.
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> (2) The decision of the High Court upon such appeal shall be final.
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> (3) The practice in relation to any such appeal shall be subject to the rules of court applicable in the High Court:
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> Provided that the High Court shall not have power to hear any appeal against an order made under s. 30 unless notice of such appeal was given within one month of the service of the order in the prescribed manner.

The rules of court applicable in the High Court mentioned in sub-s. 3 thereof is the RHC and the Order in the RHC applicable in this case is O. 55 r. 13 which states as follows:

> 13(1) Where under any written law an appeal lies from any decision of any person or body of persons to the High Court such appeal shall be made to the High Court in the State where the decision was given by motion

setting out the grounds of appeal, supported by affidavit and, if the court so directs at the hearing, by oral evidence.

(2) Unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date.

(3) Unless otherwise provided by any written law, notice of the motion shall be served on the respondent in such appeal or where the respondent is a body of persons, on the secretary, registrar or such other officer of that body of person.

The Originating Motion of the applicant sets out seven grounds of appeal as required by O. 55 r. 13(1) of the RHC. However, in the affidavit, the applicant in support of the grounds raised 42 issues in all. On 30 November 1994 the applicant filed another affidavit affirmed by K. Balaguru, counsel for the applicant, affirmed on 8 November 1994 enclosing a copy of the notes of evidence recorded during the inquiry held before the respondent. *Inter alia,* it includes the proceedings on 16 August 1994 and on 27 September 1994. According to the record of the proceedings for 16 August 1994 the applicant was found guilty on both charges preferred but the proceedings was adjourned to 27 September 1994 to hear the plea in mitigation on the part of the applicant. The said mitigation was presented on 27 September 1994. At the end of it the respondent imposed the following punishment on the applicant. On the first charge he was suspended for three months and on the second he was reprimanded. Also included an exhibit to the said affidavit of K. Balaguru is a letter from the respondent dated 25 October 1994 communicating the decision of the respondent in relation to the said disciplinary proceedings against the applicant on the two charges preferred. According to the letter, on the first charge the applicant was punished with three months suspension with effect from 27 September 1994. But as to the second charge he was **severely** reprimanded.

The hearing of the said Originating Motion of the applicant was originally fixed for hearing on 16 October 1996. On that day both parties requested that the hearing of the appeal should be by way of written submissions. The court after drawing out the schedule for the submission of the written submissions by the parties, rescheduled the hearing to 16 April 1997. While waiting for the hearing date of the appeal, the respondent on 11 December 1996 filed a summons in chambers praying for a trial under O. 33 r. (2) of the RHC to resolve the question of the seven grounds of appeal set out by the applicant in the motion as against the 42 issues raised in the affidavit in support. The summons prays that the issues that is allowed in this appeal ought to be limited

to the grounds set in the motion and that the applicant ought not to be allowed to raise all the 42 issues so stated in his affidavit in support. The said O. 33 r. 2 states as follows:

> 2. The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be tried.

This summons in chambers of the respondent was fixed for disposal on 24 March 1997 well before the hearing date of the applicant's motion scheduled for 16 April 1997. However, on 24 March 1997 the respondent withdrew its summons in chambers and indicated that he would raise the matter by way of a preliminary objection on the date of the hearing of the motion of the applicant. Hence, the summons in chambers of the respondent was accordingly struck out.

On 16 April 1997 when the motion of the applicant came up for disposal, the applicant asked for an adjournment on the ground that he had just been served with a notice of the preliminary objection on 13 April 1997 by the respondent and required time to consider the matter. On that day both parties agreed that the matter on preliminary objection be done by way of written submission as well. The court rescheduled the hearing of motion of the applicant to 29 July 1997. On that day the court considered the so-called preliminary objection raised by the respondent on the motion of the applicant. Upon consideration, the court was of the view that in substance it was not a preliminary objection as such but purely an argument on the merit of the motion of the applicant itself. The court adjourned the decision on the motion to 28 October 1997.

Though in the beginning there was a doubt in my mind as to the actual date of the impugned decision of the respondent in the light of the different dates mentioned in the motion and in the affidavit in support but in the end I am satisfied that this motion of the applicant was filed well within the one month time limit given by O. 55 r. 13 of the RHC.

The applicant was a medical practitioner in private practice with another partner, Dr. Mohd. Haniffa b. Abdullah. A dispute arose between them resulting in the break in the partnership. After the separation the applicant opened up his own clinic nearby. The ex-partner filed a complaint with the respondent against the applicant. The disciplinary proceedings against the applicant started with this complaint when the respondent referred it to the

PIC appointed by it for investigation. Arising out of its investigation, the PIC recommended two charges against the applicant as follows:

(a) That you, Dr. Mohan a/l Rajadurai, between the period of 13th May, 1987 to 10th April, 1990 at your clinic at No. 6, Jalan Adil, Taman Sri Muda, Shah Alam, had issued false medical sick certificates for a fee certifying that they were sick and unfit to attend for the proper performance of their duties.

(b) That you, Dr. Mohan a/l Rajadurai, had on or about 15th April 1990 advertised through a banner announcing the commencement of your clinic at Taman Sri Muda, Shah Alam.

The respondent accepted the recommendation of the PIC but decided to amend the first charge recommended and to retain the second charge as framed by the PIC. As stated very early in this judgment, by its letter of 3 June 1992 the respondent informed the applicant accordingly of the intention to hold an inquiry over the matter. After the inquiry, on 16 August 1994 the applicant was found guilty on the two charges before the respondent. On 27 September 1994 he was imposed the punishment of three months suspension from practice on the 1st charge and reprimanded on the 2nd charge. However, in communicating in writing to the applicant, by its letter of 25 October 1994, the punishment for the second offence was to be **severely** reprimanded.

In arguing the appeal before me against the decision of the respondent, the learned counsel for the applicant raised several issues. *Inter alia*, whether the failure to keep proper medical record in the first amended charge constitutes infamous conduct, which the applicant had been guilty of under s. 29(2)(b) of the Medical Act 1971 (hereinafter referred to as 'the Act'). He submits that the failure to keep such record would not constitute infamous conduct so as to form a basis for disciplinary action against the applicant. The Act or the Code of Professional Conduct (hereinafter referred to as 'the Code'), governing the applicant does not give a definition of the term "infamous conduct". From the facts of the case there never has been any obligation in law or ethic cast upon the applicant to keep any record in respect of his patients in respect of whom medical sick certificates were issued, bearing in mind that in the proceedings before the PIC no evidence was led to show what really is a proper medical record or what constitutes such a record. In the course of his business the applicant attended to thousands of patients in his clinic. However, in the course of the proceedings the amended first charge relates only to 22 of the patients but none of the patients were called to give evidence to substantiate the charge even though these 22 patients were within the power of the complainant to call them as his witnesses in support of the allegation. In Part II of the Code four categories were said to constitute infamous conduct which are:

(i) neglect or disregard of professional responsibilities;

(ii) abuse of professional privileges and skill;

(iii) conduct derogatory to the reputation of the medical profession;

(iv) advertising, canvassing and related professional offences;

but none is related in any way to the conduct of the applicant in the first amended charge. Hence, there is no basis to sustain the said charge on the facts or the law as provided by the Act or the Code. There might well be a basis under the original charge recommended by the PIC under item (iii) above for the allegation that the applicant had issued false medical sick certificate for a fee certifying that they were sick and unfit to attend for the proper performance of their duties. But that charge was no more after being substituted by the respondent which is based purely on his failure to keep proper medical records of the consultations for the said 22 patients whose evidence was not before the respondent upon the allegation that the medical sick certificates issued to them were false. As such on the amended first charge before the respondent, the applicant cannot be found guilty and be punished. In his reply, the learned counsel for the respondent submitted that under item (i) above, the primary responsibility of the respondent is to protect the public and to uphold that responsibility disciplinary action can be taken against its members who is negligence or lacking in professional responsibility towards the patients on the part of the member. The public expects the member to maintain a higher standard of treatment given to them, failing which the conduct of the member would fall against item (ii) above being an abuse of professional privileges and skill. As such when a practitioner fails to maintain any proper medical record recording the particulars of examination carried out upon the patient wherein a medical sick certificate is being issued, the action of the practitioner amounts to infamous conduct. Furthermore, the failure to maintain such a record would indicate that the treatment given is of a low standard and lacking in detail and falls within item (iii) mentioned above. As to the failure to call the 22 patients named in the charge, the learned counsel contended that it is well within the discretion of respondent whether to call them or not. He pushes the burden on the applicant to support his defence by calling them to be his witnesses. I cannot accept that line of submission made by the learned counsel for the respondent. The PIC recommended to the respondent on the first charge pertaining to the issue of false medical sick certificate for a fee. But the respondent chose not to adopt the recommendation on this charge. Instead framed a new charge for failure to keep proper medical records in respect of the said 22 patients. Firstly, what is that so called proper medical records and secondly, which is of crucial importance, what is the

evidence of infamous conduct alleged against the applicant in relation to the keeping of the record in respect of the 22 patients? The evidence of the 22 patients is very important to bring home the charge against the applicant. It is not for the applicant to negative the allegation made against him. A party who asserts must prove his case failing which no case can ever be made out against the applicant. I very much agree with the submissions made by the learned counsel for the applicant relating to this charge against him before the respondent. There is no iota of evidence even on the lowest standard of proof that the applicant is guilty of the first charge before the respondent. It is for the 22 patients named in the charge or at least some of them to come forward to give evidence for the complainant to support the charge of the applicant's failure to keep proper medical records of his consultations for them to whom the applicant had issued medical sick certificates certifying that they were unfit to perform their duties. For this failure to do so had rendered the inference to the contrary. Therefore, on this first charge the applicant succeeds and the appeal must be allowed by substituting a finding of not guilty against him of the charge. In *Dudley Ernest Lyncoln Wager Felix v. General Dental Council* [1960] AC 704 the House of Lord held that the word "infamous or disgraceful conduct" should be construed in conjunction with the word "in a professional respect," and to make good such a charge in relation to the keeping of the prescribed dental records it was not enough to show that some mistake had been made through carelessness or inadvertence from two or three cases out of several hundred patients treated. To make such a charge good there must, generally speaking, be some moral turpitude or fraud or dishonesty in the conduct complained of, or such persistent or reckless disregard of the practitioner's duty in regard to records as could be said to amount to dishonesty for the purpose. The question was to some extent one of degree. Any wrongful certification cannot be regarded as amounting to infamous or disgraceful conduct.

On the second charge before the respondent, the applicant was accused of advertising through a banner announcing the commencement of his clinic at Taman Sri Muda, Shah Alam. He is said thereby to have committed a disciplinary offence under s. 29(2)(b) of the Act which is that he has been guilty of infamous conduct in any professional respect. For that he is liable to be punished under s. 30 of the Act. The said banner is shown in the copy of the photograph tendered as exh. R2 and is at p. 256 of the affidavit of K. Balaguru of 8 November 1994 for the applicant. From the photograph the banner was seen hanging across a building premises in front with the words mentioned earlier printed on it. The learned counsel for the applicant contends that such words merely serve to inform anyone concerned that there is a clinic situated at the first floor of the building premises and that this clinic was to

commence business on 5 May 1990 and the name of the clinic is Klinik Mohan. Therefore, it is not such an advertisement which the applicant is prohibited by the Code from indulging in. The relevant provisions relating to this second charge on advertising as provided by the Code are as follows:

Clause 4. Advertising, canvassing and related professional offences.

The medical profession in this country has long accepted the convention that doctors should refrain from self-advertisement. In the council's opinion self-advertisement is not only incompatible with the principles which should govern relations between members of a profession but could be a source of danger to the public. A practitioner successful at achieving publicity may not be the most appropriate doctor for a patient to consult. In extreme cases advertising may raise illusory hopes of a cure.

4.1. Advertising and Canvassing

4.1.1 Advertising, whether directly or indirectly, for the purpose of obtaining patients or promoting his own professional advantage, or, for any such purpose, of procuring or sanctioning, or acquiescing in, the publication of notices commending or directing attention to the practitioner's professional skill, knowledge, services, or qualification, or depreciating those of other, or of being associated with, or employed by, those who procure or sanction such advertising or publication, and canvassing, or employing any agent or canvasser, for the purpose of obtaining patients, or of sanctioning, or of being associated with or employed by those who sanction, such employment e.g. private hospitals clinics and other medical institutions are in the opinion of the council contrary to the public interest and discreditable to the profession of Medicine, and any registered medical practitioner who resorts to any such practice renders himself liable, on proof of the facts to the satisfaction of the council to disciplinary punishment.

4.1.2. The Council recognises that the profession has a duty to disseminate information about advances in medical sciences and therapeutics provided it is done in an ethical manner.

4.2 Announcement in the Lay Press Regarding Practice

An announcement by the Malaysian Medical Association on the commencement or change of address of practice is permissible as a service to the community.

4.3. Professional Calling Cards

A practitioner may carry calling cards but he should not distribute calling cards with the purpose of soliciting patients. The information permitted on a professional calling card is contained in Appendix II.

4.4. Signboards

A signboard for the purpose of assisting patients to locate a practitioner is permissible provided it conforms to the limits laid down by the Council as contained in Appendix III.

4.5. Name Plates/Doorplates

These should conform with the limits laid down by the Council as contained in Appendix IV.

4.6. 24 Hour Clinics

These should conform with the requirement laid down by the Council as contained in Appendix V.

The learned counsel for the applicant contends that the words written on the banner was not for purpose of promoting the applicant's own professional advantage and also not for the purpose of directing attention to the applicant's professional skill, knowledge, services, or qualification, and also not for the purpose of depreciating those of other as contemplated by the Code. There is in the Code provisions giving exemption for the purpose of assisting patients to locate a practitioner on a notice board. But the learned counsel submits that a banner is not a notice board.

Now, having considered the arguments and upon the facts and the surrounding circumstances prevailing in this case, I am inclined to agree with the learned counsel for the appellant. Before the event, the applicant was in partnership with the complainant operating a clinic. After the breaking off the applicant soon after, wanted to operate on his own in a premise, a clinic four doors away. He needed to inform his clients of his new place of business. That was the information conveyed by the wordings on the banner. Clause 4.2 of the Code itself permits such circumstances to be done and further to that, even cl. 4.4 permits it to be done on a signboard which is more of permanent in nature than on the banner. I would agree that by so displaying the banner in the circumstances, the applicant could not be said by such conduct to have gone against the provisions of cl. 4 of the Code to subject him to disciplinary action by the respondent.

That apart, of utmost importance in dealing in such a matter as this, is the manner by which this proceedings before the inquiry tribunal set up by the respondent is being conducted. The guilt or the innocence of the respondent upon the two charges leveled against him by the respondent is dependent upon the evidence proffered at the hearing before a body entrusted with the duty to evaluate and make a decision. Upon the evaluation of all those evidence both oral and documentary placed before them, a decision is made one way or another. This is the least that the rule of natural justice expects notwithstanding the submission by the learned counsel for the respondent that this hearing by the respondent is not to be equated with that administered by a court of law. More so, as in this case, the decision which was made by the respondent affects the livelihood of the appellant. His right to livelihood is one which is guaranteed by our Federal Constitution: *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and Another Appeal* [1996] 1 MLJ 481. The decision is that of a decision maker comprising a body constituted by the respondent. They as a body are required to hear all the evidence before coming to a valid decision. However, in this case, it is observed, as pointed out by the learned counsel for the applicant in his submission, that the proceedings against the appellant stretched over a period of time. The panel took in all five separate days in this proceedings hearing evidence from witnesses and submissions made by those representing the complainant and the applicant before coming to a decision against him. During this period of five days the decision-makers were not made up of the same persons forming the body. They changed from day to day. Only two of them were present throughout the proceedings. Under the circumstances it cannot be said that the decision made by the respondent is correct in law because notwithstanding that the proceedings were recorded on audio tapes for the benefit of those who were not present during certain days of the proceedings they would merely be listening to the recorded voices of those who took part throughout but they were precluded from having the opportunity of seeing for themselves the demeanour of each of the witnesses when giving their evidence. This aspect of the matter is of fundamental importance in the making of the assessment upon the credibility of the evidence of each of those witnesses who gave evidence during the proceedings. This is an error of law on which the decision of the case depends. In *Pearlman v. Keepers and Governors of Harrow School* [1979] 1 QB 56, in a *certiorari* proceedings which applies with equal force to a case of an appeal, such as this, Lord Denning MR said this at p. 70:

> It is intolerable that a citizen's rights in point of law should depend on which judge tries the case, or in which court it is heard. The way to get things right is to hold thus: no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.

On this ground alone, this appeal of the applicant must be allowed as the respondent had breached the fundamental rule of natural justice in arriving at their decision upon the matter.

For the reasons given, I allow this appeal of the applicant and set aside the decision of the respondent with costs.